Supreme Court, U.S.
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NO. 91-1251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAINEY BROTHERS CONSTRUCTION COMPANY, INC. AND TRACY RAINEY,
PETITIONERS

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT, CITY OF MEMPHIS AND THE CITY OF MEMPHIS BUILDING DEPARTMENT,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS, WESTERN SECTION

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether there are adequate and independent state legal grounds to deny the petitioners' motions to amend the complaints filed in the trial court and to refuse to invoke jurisdiction pursuant to 28 U.S.C. § 1257?

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

TENNESSEE RULES OF CIVIL PROCEDURE INVOLVED

Rule 15.03 Relation Back of Amendments.

Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a

misnomer or other similar mistake concerning the identity of the proper party, the action would have been brought against him. Except as above specified, nothing in this rule shall be construed to extend any period of limitations governing the time in which any action may be brought.

Rule 55.01 Entry

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, judgment by default may be entered as follows:

The party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian,

committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least five (5) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute.

STATEMENT OF THE CASE

This case arose out of petitioners attempts to secure from the Memphis and Shelby County Board of Adjustment (hereinafter Board) a variance from the elevation requirements for a 165-unit apartment project on a 14-acre tract of land in east Memphis. The Board granted the variance in August 1975. However, the granting of the variance was challenged for failure to provide a public hearing on the issue and the variance was later revoked. Petitioners request to reconsider the revocation was denied.

On May 27, 1976, two actions were filed in the Circuit Court of Shelby County, Tennessee, and proceeded independently until the Tennessee Supreme Court consolidated the actions.

In the first complaint styled Rainey Brothers Construction Company, Inc. v. Memphis and Shelby County Board of Adjustment, City of

Memphis, and City of Memphis Building Department, Docket No. 53654-8 R.D., a writ of certiorari was brought to review the action of the Memphis Board of Adjustment in revoking the variance sought by the petitioner.

The second complaint Rainey Brothers Construction Company, Inc. v. City of Memphis, a municipal corporation, and the City of Memphis Building Department, Docket No. 73473-8 R.D., sought damages allegedly resulting from the revocation of the variance.

On November 14, 1988, petitioners filed an amended complaint in each of the actions seeking another writ of certiorari, additional damages, and relief based upon new causes of action. Respondents filed motions to dismiss the amended complaints on December 30, 1988.

On February 10, 1989, appellant sought leave to file a second amended complaint and leave was granted. On March 8, 1989, the second amended complaints were filed. The second amended complaint sought the issuance

of another writ of certiorari, damages in the amount of $125,000,000.00, added as defendants members of the Memphis and Shelby County Board of Adjustment as of May 27, 1986, as individual defendants, and added a new petitioner, Tracy Rainey, individually. Motions to dismiss the second amended complaint were filed by respondents on March 21, 1989.

Orders were entered by the trial judge on August 2, 1989, sustaining the respondent's motions to dismiss the amended complaints, A-1, and ordering the cases to be tried on the original pleadings. (only the order in case no. 53654-8 R.D. is included as the order in case no. 73473-T.D. is virtually identical)

Subsequently, the petitioners appealed this case to the Tennessee Court of Appeals, Western Section, pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, which provides for interlocutory appeals of court orders. An opinion affirming the trial

court's order of dismissal of the amended complaints was entered on May 24, 1991. A-6.

Petitioners then filed a petition for permission to appeal to the Supreme Court of Tennessee, but their application was denied by an order entered by that court on November 12, 1991. A-20.

SUMMARY OF THE ARGUMENT

That the rulings by the state courts rested on adequate and independent state grounds and, therefore, that the petitioners have failed to demonstrate that this court should grant the petition for writ of certiorari pursuant to 28 U.S.C. § 1257.

ARGUMENT

Petitioners' primary contention is that the dismissal of their amended complaints by

the state trial court is a denial of due process and equal protection. Their petition for writ of certiorari, however, fails to support this claim in law or fact.

Petitioners intimate that the dismissal of the Second Amended Complaints was upheld by the Tennessee Court of Appeals and Tennessee Supreme Court as part of a longstanding policy of discrimination against claimants in the state courts of Tennessee who bring forth federal claims. The petitioners cite the case of Poling v. Goins, 713 S.W.2d 305 (Tenn. 1986) in support of such an implication. However, the petitioners fail to point out that in Poling, id., the Tennessee Supreme Court reviewed their earlier decision in Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969), and determined that since the decision in Chamberlain, supra, the federal courts had ruled that the federal courts did not have exclusive jurisdiction over federal legislation. The Tennessee Supreme Court,

without dissent, overruled Chamberlain, ibid. and held that actions under 42 U.S.C. § 1983 could be brought in a Tennessee state court. There is no showing by the petitioners that the courts of the state of Tennessee have engaged in such discrimination.

The actual issue to be considered in this case is whether or not there are adequate and independent state grounds to support a decision by this court to abstain from exercising its jurisdiction pursuant to 28 U.S.C. §1257. This court has long recognized that disposition of a case based on state procedural law can be independent and adequate grounds, provided the procedural rule is regularly followed. Barr v. City of Columbia, 378 U.S. 146, 149-150, 84 S.Ct. 1734, 1736, 12 L.Ed 2d 766 (1964); Hathorn v. Lovorn, 457 U.S. 255, 262-263, 102 S.Ct. 2421, 2426, 72 L.Ed 2d 824 (1982), rehearing denied; Johnson v. Mississippi, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed 2d 222 (1988).

This court has acknowledged that states have a legitimate reason to enforce their procedural rules and that a party's failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground to bar this court from reviewing the state court's decision. Michigan v. Tyler, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7, 56 L.Ed 2d 486 (1978).

The decision of both the Tennessee Court of Appeals and the trial judge in this case was based on their interpretation of Tennessee Rule of Civil Procedure 15.03.

The petitioners, in their petition for writ of certiorari, claim that the trial judge, in his order dated August 2, 1989, A-1, held that the motion to dismiss was well taken as the petitioners had failed to demonstrate any violation of federal rights because there was an adequate post-deprivation remedy available. The petitioners then allege that

the Court of Appeals rendered their decision in the case on other grounds.

A close inspection of both of these orders reveal that the basis for the trial court's dismissal of the amended complaints, and the Court of Appeals upholding of that dismissal are identical.

In his order granting the motion to dismiss, the trial judge specifically found that the amended complaints must fail because the claims for inverse condemnation and claims under 42 U.S.C. §1983 were both barred by the applicable statute of limitations.

The Tennessee Court of Appeals, Western Section, also found in their opinion, A-6 that these claims were time barred. Supported by numerous citations, A-16, the Court of Appeals determined that the amended complaints raised new causes of action and did not relate back to the original pleadings.

It should also be noted that the Court of Appeals recognized that it would be

prejudicial to the respondents to grant the amendment due to the fact that the petition had been filed 12 years previously. Petitioners counter this finding in their petition for writ of certiorari by asserting that the respondents did not file a responsive pleading in this cause until 1988. Respondents concede that no responsive pleading was filed until that time, but would show that petitioners had the right to file a motion for default judgment pursuant to Tennessee Rule of Civil Procedure 55.01 prior to 1988, but failed to do so.

Nowhere in the petition for writ of certiorari do the petitioners cite any cases or facts to support their conclusion that they have been denied due process and equal protection by the courts of the state of Tennessee. Nor do the petitioners demonstrate that they will suffer actual harm if their petition is denied. In their original complaints, the petitioners asked that the

rulings of the board which revoked their variance be set aside as arbitrary, capricious, and illegal pursuant to their petition for request for writ of certiorari to the Circuit Court of the State of Tennessee. The trial court has never proceeded to determine this issue, and has never conducted a factual finding or hearing in this case.

This case should proceed forward on the petition for writ of certiorari to the state courts and not on causes of action first raised by the petitioners 12 years after the filing of the original complaints. The writ of certiorari to the Circuit Court of Tennessee is the only cause of action on which the petitioners should proceed in the trial court.

This Court should also be aware of several misstatements in the Petition for Writ of Certiorari. The Tennessee Inverse Condemnation Statute, T.C.A. § 29-16-123, and 42 U.S.C. § 1983 existed at the time of the

filing of both complaints. For reasons unknown to the respondents, petitioners did not choose to assert those causes of action at the time of the filing of the complaints, and therefore, did not, as asserted in their petition, seek "from the beginning of this case to assert all remedies available to them" (p. 11).

It should also be noted that in their list of parties, the petitioners name eight individuals who were members of the Memphis and Shelby County Board of Adjustment at the time that the variance in question was revoked. The plaintiffs attempted to add these individuals as defendants in their amended complaints, but the trial court and the Court of Appeals dismissed these individuals as parties A-3 and A-13, respectively. Both courts ruled that the petitioners failed to show that these prospective defendants knew that but for the petitioners' mistake they would have been

named parties to this action. The courts also found that the petitioners failed to show that but for a misnomer or other mistake the action would have been brought against these individuals. Tennessee Rule of Civil Procedure 15.03. The petitioner fails to put forward any facts or case law in their petition for writ of certiorari to show that these individuals should be added as parties to this suit. Therefore, it is respondent's contention that any such request to add additional defendants has been waived, and that the individuals listed as parties have been fully and finally dismissed from this action.

CONCLUSION

The petition for writ of certiorari should be denied and the decision of the Tennessee Court of Appeals should not be disturbed.

RESPECTFULLY SUBMITTED,

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IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

RAINEY BROTHERS CONSTRUCTION COMPANY, INC., AND TRACY RAINEY, INDIVIDUALLY,

Petitioner,

No. 53654-8 R.D.

VS.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT, COMPOSED OF: RUFUS JONES; MRS. T. KYLE CRESON, JR.; ROBERT KNAPP; JOHN F. PALMER; JERRY E. TAYLOR; CARY WHITEHEAD; BARNEY GOLDING; JOHN S. SHEPHARD; AND EACH, INDIVIDUALLY; AND THE CITY OF MEMPHIS, A MUNICIPAL CORPORATION; AND THE CITY OF MEMPHIS BUILDING DEPARTMENT,

Defendants.

ORDER GRANTING MOTION TO DISMISS

This cause came on to be heard upon the Defendants' Motion to Dismiss the Second Amended Complaint, argument of counsel, and the entire record in this cause, from all of which;

It appears to the Court that the Defendants' Motion to Dismiss is well taken

and that the Second Amended Complaint should be dismissed and that this cause should proceed on the original pleadings filed on May 27, 1976, with the Defendants being only the original Defendants as set forth therein, and the Court will decide at a subsequent date the issue as to the right of the Petitioners to substitute Tracy Rainey, individually, as a Petitioner in this cause.

It further appears and the Court so finds that the Second Amended Complaint fails to state a claim upon which relief can be granted; that the action for inverse condemnation is a new cause of action and not properly a part of the pleadings before the Court, and the one-year Statute of Limitations (Tenn. Code Ann. 29-16-124) bars the Petitioner from inverse condemnation; that the claim for violation for Civil Rights 42 U.S.C. 1983, et seq., is a new cause of action that is barred by the one-year Statute of Limitations set forth in Tenn. Code Ann.

2803104(a); that there was no violation of state of federal laws or Constitution as an adequate postdeprivation remedy was provided by the state in the form of Tenn. Code Ann. 29-16-123, et seq., which Petitioner failed to utilize within the appropriate time; that because of the aforesaid statutes and law, including the appropriate application of the function of the Common Law Writ of Certiori and the great period of time involved, that only the original Defendants in the original pleading will remain parties; that the attempt to include the aforesaid allegations and the Board of Adjustment members in their individual capacities constitute new causes of action, which do not relate back to the original pleadings, as there was no notice in the original pleadings of these new causes of action under the most liberal reading thereof; that damages are not recoverable under the Common Law Writ of Certiori, which is the appropriate mechanism for judicial review of

actions of the Memphis and Shelby County Board of Adjustment.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Dismiss the Second Amended Complaint is granted for the reasons above set forth and that the Second Amended Complaint is dismissed; that this cause will proceed on the original pleading filed on May 27, 1976, with the original Defendants as named therein being the only defendants and does not include the members of the Memphis and Shelby County Board of Adjustment in their individual capacity, and the Court will decide at a subsequent date the issue as to the right of the Petitioner to add or substitute Tracy Rainey, individually, as a Petitioner in this cause; and that there being no just reason for delay, that a final judgment on the Motion to Dismiss the Second Amended Complaint is hereby entered in favor of the Defendants and the Defendants are allowed thirty (30) days from the entry of

this Order to respond to the original

Petition.

S/William W. O'Hearn
JUDGE

DATE: 2 August 1989

S/Hugh C. Howser
Attorney for Petitioner

S/E. Brady Bartusch
Attorney for Defendants

A TRUE COPY ATTEST
Clint Crabtree, Clerk

_____D.C.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RAINEY BROS. CONSTRUCTION
COMPANY, INC. and TRACY RAINEY

Plaintiffs/Appellants

v. Shelby Law # 64

MEMPHIS & SHELBY COUNTY BOARD
OF ADJUSTMENT, CITY OF MEMPHIS
and CITY OF MEMPHIS BUILDING
DEPARTMENT

Defendants/Appellees

From the Circuit Court of Shelby County,
Tennessee

The Honorable William W. O'Hearn

William J. Harbison, Nashville
Attorney for Appellants

Monice Moore Hagler, Memphis
E. Brady Bartusch, Memphis
Attorneys for Appellees

Opinion Filed: May 24, 1991

AFFIRMED

HIGHERS, J.

TOMLIN, P.J., W.S. (Concurs)
CRAWFORD, J. (Concurs)

This matter is before the Court on an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. This appeals arises from two cases which were filed simultaneously on May 27, 1976, in the Circuit Court at Shelby County, Tennessee. However, the Supreme Court referred to the cases as "now consolidated" in its order granting permission for the interlocutory appeal. The plaintiff, Rainey Brothers Construction Company, Inc. (Rainey Brothers), brings this appeal asserting that the trial court erred in sustaining defendants' motions to dismiss the second amended complaints in both Circuit Court actions and in not allowing the proposed amendments to each complaint pursuant to Rule 15 of the Tennessee Rules of Civil Procedure.

Rainey Brothers owns a 13 acre tract of land in Memphis on which it planned to build a 165 unit apartment complex. On December 22, 1969 the Memphis and Shelby County Board of Adjustment (the Board) approved construction

of 165 apartments on the subject property at an elevation level of 274.9 msl. A request was submitted to the Board by Rainey Brothers for an interpretation of a condition on a previous application regarding the fill elevation level of the subject property. Pursuant to that request, on August 27, 1975, the Board ruled that the property need only be filled to an elevation of 270 msl. as recommended by the City of Memphis Engineering Department, rather than the previously required elevation of 274.9 msl. The Board relied upon the written recommendation of the Deputy City Engineer, which states that the 270 msl elevation is consistent with other new construction in the area. Following the Notice of Disposition lowering the fill elevation level of the subject property to 270 msl Rainey Brothers waited approximately 60 days before beginning construction in case an appeal was filed. No appeal was filed within that time and Rainey Brothers began

construction in accordance with a fill elevation level of 270 msl. Apparently, there was a group of citizens who objected to the project and their interests were represented in a letter from a local attorney to the City of Memphis Building Department in which objection was taken to the fact that no public hearing was held and no notice was given to anyone of the change in a "substantial condition" in the Notice of Disposition issued regarding the subject property. On April 28, 1976, eight months after the Board's ruling, the Board rescinded its action of August 27, 1975 and reinstated the previously required elevation of 274.9 msl.

Subsequently, on May 25, 1976, Rainey Brothers filed a Petition for Reconsideration asking the Board to reconsider its new disposition. The Board refused to grant the Petition forr Reconsideration.

On May 27, 1976, Rainey Brothers simultaneously filed two actions in the Circuit Court. The first action ("Rainey I") is against the Board and the City of Memphis Building Department. That action is captioned "Petition for Certiorari, Supersedeas, Injunction and Other Relief." In that action Rainey Brothers seeks an injunction superseding the action of the Board and preventing the City of Memphis Building Department from enforcing the Board's ruling. The second action ("Rainey II") is brought against the City of Memphis and the City of Memphis Building Department and seeks damages resulting from the Board's ruling.

On November 14, 1988, Rainey Brothers simultaneously filed amended complaints in both actions setting forth the facts in greater detail. At that time the defendants had not yet filed any answer. Rainey Brothers later made a Motion to Amend the Amended Complaints. The trial court entered an order

allowing Rainey Brothers to file the second amended complaints and the second amended complaints were both filed on March 8, 1989. Defendants moved to dismiss the second amended complaints and their motions were granted. On August 2, 1989, the trial court dismissed the second amended complaint in both actions stating that the causes should proceed on the original pleadings. The order states that the defendants shall only be those defendants as set forth in the original pleadings filed on May 27, 1976. The court also found that the second amended complaints bring up new causes of action which are barred by the statute of limitations and do not relate back to the original pleadings. It is on this order that Rainey Brothers appeals. Rainey Brothers asserts that the trial court erred in granting defendants' Motion to Dismiss the Second Amended Complaints and in not allowing the proposed amendments.

I.

Rainey Brothers attempts to add to the action in several ways through the second amended complaints. First Rainey Brothers made several additions to the named defendants in both suits. In Rainey I Rainey Brothers added each of the members of the Board, individually, as defendants. In Rainey II Rainey Brothers added the Board and each of its members individually as defendants.

The amendment of complaints is governed by Rule 15 of the Tennessee Rules of Civil Procedure. Rule 15.03 states:

> **Rule 15.03 Relation Back of Amendments**
>
> Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment

relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisified and if, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a misnomer or other similar mistake concerning the identity of the proper party, the action would have been brought against him. Except as above specified, nothing in this rule shall be construed to extend any period of limitations governing the

time in which any action may be brought.

Rule 15.03 sets forth two requirements which must be met in order for an amendment to change the parties against whom the claim is asserted. First, the new parties must have received such notice of the action that they will not be prejudiced in maintaining their defense. See Goss v. Hutchins, 751 S.W.2d 821, 824 (Tenn. 1988); Lease v. Tipton, 722 S.W.2d 379, 380 (Tenn. 1986). It is reasonable to assume that the members of the Board were aware of both actions brought by Rainey Brothers before they were made parties to the actions pursuant to the second amended complaints. However, Rule 15.03 requires more than merely that a potential new defendant be aware of the existence of the action prior to being made a party. The second requirement is that each potential new party must have known that for a misnomer or mistake concerning his or her identity, the action would have been

brought against him or her. Lease v. Tipton, supra. Furthermore, it has been held that the plaintiff has the burden of showing that the failure to name the new defendants in the original complaint resulted from a mistake concerning the identity of the proper parties. Smith v. Southeastern Properties, 776 S.W.2d 106 (Tenn. App. 1989). A mistake within the meaning of Rule 15.03 does not exist simply because the party who may be liable for conduct alleged in the original complaint was omitted as a party defendant. Id. at 109. The circumstances of the case before us do not satisfy the second requirement. Rainey Brothers has failed to show that the Board and its individual members knew that but for Rainey Brothers' mistake, they would have been named as parties to the actions to which they were later added by the second amended complaints. Furthermore, Rainey Brothers has failed to show that the failure to name these defendants in the original complaints resulted

from a mistake concerning their identity. The defendants must remain those named in the original pleadings.

II.

Rainey Brothers introduces several new claims to the action through the second amended complaints. Particularly noteworthy are the claims of taking, through a violation of the fifth and fourteenth amendments to the United States Constitution and article 1 section 21 of the Tennessee Constitution, violation of 42 U.S.C. § 1983 and inverse condemnation.

As provided in Rule 15, only those claims which relate back to the original pleadings are saved from the effects of the applicable statute of limitations. Tenn. R. Civ. P. 15.03. However, where the amendment in substance raises a new cause of action, the courts have repeatedly held that the amendment does not relate back to the original pleadings

and the statute of limitations continues to run until the amendment is filed. Energy Sav. Prods. Inc. v. Carney, 737 S.W.2d 783 (Tenn. App. 1987). Thus, the real question is whether the amendments raise a new cause of action.

There are several methods of determining whether an amendment raises a new cause of action or merely relates back to the original pleading. See Gamble v. Hospital Corp. of America, 676 S.W.2d 340 (Tenn. App. 1984). Tennessee courts have generally followed the statutory standard that the amendment must arise from the same conduct, transaction or occurrence as set forth in the original pleadings. Karash v. Pigott, 530 S.W.2d 775 (Tenn. 1975). Notice to the defendant is not expressly required by the statutory standard for relation back but the Tennessee Supreme Court has determined that notice is the critical element involved in determining whether amendments to pleadings relate back.

Floyd v. Rentrop, 675 S.W.2d 165, 168 (Tenn. 1984).

Rainey Brothers asserts that the claims of taking, violation of 42 U.S.C. § 1983 and inverse condemnation all relate back to the original pleadings. The original complaints ask merely that the actions of the Board be ruled illegal, arbitrary, and capricious; that an injunction be issued superseding the Board's actions; that the Board be enjoined from enforcing the action, and; that Rainey Brothers be given reasonable damages under $35,000.

Nothing in the general fact situation set forth in the original complaints put the defendants on notice that they may have to defend any of the foregoing claims of taking, 42 U.S.C. § 1983 or inverse condemnation. Given the fact that the defendants were not on notice from their original pleadings that they may have to defend these claims, the

amendments do not relate back to the original pleadings and given the fact that the amendments were filed over 12 years after the original pleadings, the defendants would be unfairly prejudiced if they were made to defend these new causes of action.

Thus, we affirm the trial court finding that the second amended complaints do not relate back to original pleadings as required by Rule 15 and finding that the trial court did not err in sustaining defendants' motions to dismiss the amended complaints. Costs are assessed to Rainey Brothers.

S/Highers
HIGHERS, J.

TOMIIN, P.J., W.S. (Concurs)

CRAWFORD, J. (Concurs)

IN THE SUPREME COURT OF TENNESSEE

RAINEY BROS. CONSTRUCTION
COMPANY, INC. AND TRACY RAINEY,

Plaintiffs-Appellants,

v. Shelby Law No. 64
No. 53654-8 R.D.

MEMPHIS & SHELBY COUNTY BOARD
OF ADJUSTMENT, ET AL.,

Defendants-Appellees.

and

RAINEY BROS. CONSTRUCTION
COMPANY, INC. AND TRACY RAINEY,

Plaintiffs-Appellants,

v. Shelby Law No.
No. 73473-8 T.D.

THE CITY OF MEMPHIS, ET AL.,

Defendants-Appellees.

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, it is the decision of the Court that the application should be and the same is hereby denied.

PER CURIAM